



**Missouri Department of** dnr.mo.gov  
**NATURAL RESOURCES**  
Michael L. Parson, Governor Carol S. Comer, Director

**EPA Complaint No. 01RNO-20-R7**

May 19 2021

Lillian S. Dorka, Director  
U.S. Environmental Protection Agency  
External Civil Rights Compliance Office  
1200 Pennsylvania Avenue, Northwest  
Washington, D.C. 20460-1000  
Via electronic mail: [Dorka.Lilian@epa.gov](mailto:Dorka.Lilian@epa.gov)

Dear Director Dorka:

Attached to this letter is the Missouri Department of Natural Resources' 40 C.F.R. § 7.115(d) Response to the U.S. Environmental Protection Agency, External Civil Rights Compliance Office's March 30, 2021, letter regarding the ECRCO's Partial Preliminary Findings for EPA Complaint No. 01RNO-20-R7.

As the Department previously stated, proactive prevention of unlawful discrimination and compliance with civil rights laws are among our highest priorities. We welcome dialogue on ways the Department can improve its notice, access, and public participation to ensure access and inclusion in our programs and regulatory decisions. The Department complies with Title VI, but we are continually looking for ways to improve what we do.

Sincerely,

Carol S. Comer  
Director

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**Missouri Department of Natural Resources' § 7.115(d) Response to ECRCO Partial Preliminary Findings for EPA Complaint No. 01RNO-20-R7**

**I. Introduction**

The Missouri Department of Natural Resources (Department or MDNR) here responds to the U.S. Environmental Protection Agency (EPA) External Civil Rights Compliance Office's (ECRCO) March 30, 2021, letter of Partial Preliminary Findings for EPA Complaint No. 01RNO-20-R7: Non-Compliance (Partial Preliminary Findings). For clarity, the Department will reference this document as it's § 7.115(d) Response.

According to ECRCO's Case Resolution Manual (CRM), Preliminary Findings follow from "the investigation process [where] ECRCO establishes a factual record and analyzes the issues accepted for investigation through the applicable legal standards."<sup>1</sup> The CRM lists three applicable legal theories: (a) Disparate/Different Treatment, (b) Disparate Impact/Effects, and (c) Retaliation.<sup>2</sup> Pursuant to 40 C.F.R. § 7.115, the EPA's Office of Civil Rights (OCR, which ECRCO is within), may periodically conduct compliance reviews of a recipient program or activities receiving EPA assistance. Additionally, ECRCO has represented to the Department that "ECRCO is a neutral fact finder" and will "gather the relevant information."<sup>3</sup>

The Department has not and does not discriminate against any community based on any protected class, including race, color, or national origin<sup>4</sup> and our civil-rights practices fully comply with federal law. MDNR looks for opportunities to ensure our procedural safeguards are sufficiently robust to prevent and address unlawful discrimination. The Department is committed to affirmative nondiscrimination in all of its programs and functions. MDNR considers nondiscrimination a duty and an integral part of its mission, regardless of obligations by its federal funding. Despite ECRCO's partial preliminary findings, which are not a final conclusion of fact or law, the Department believes that ECRCO's completed investigation will find no discrimination occurred and the Department is meeting its legal obligations.

**II. General response to the Partial Preliminary Findings**

On September 29, 2020, ECRCO notified the Department it had accepted an administrative complaint, and identified the following "issues for investigation" (Issues):

1. Whether MDNR discriminated against a community of color, collectively hereinafter referred to as "Dutchtown" located in St. Louis, MO, on the basis of race, color and/or national origin in violation of Title VI of the Civil Rights Act of 1964, and EPA's implementing regulation, 40 C.F.R. Part 7, by issuing Part 70 Intermediate Operating Permit Number OP2020-008 to the Kinder Morgan Transmix Company, LLC operations;

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<sup>1</sup> Case Resolution Manual, January 2021, p. 28, [https://www.epa.gov/sites/production/files/2017-01/documents/final\\_strategic\\_plan\\_ecrco\\_january\\_10\\_2017.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/final_strategic_plan_ecrco_january_10_2017.pdf).

<sup>2</sup> *Id.*, at 26-27.

<sup>3</sup> Exhibit 1, p. 3.

<sup>4</sup> The Department does not discriminate against *any* protected class; these protected classes are referenced by ECRCO's in the Partial Preliminary Findings, p. 2.

2. Whether MDNR has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to the MDNR's services, programs, and activities, for individuals with limited English proficiency (LEP) and individuals with disabilities, and whether the MDNR has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.<sup>5</sup>

The ECRCO's Case Resolution Manual (CRM) identifies that ECRO *must* provide a "clear statement of the issue(s) to be investigated."<sup>6</sup> Additionally, 40 C.F.R Part 7 and the Case Resolution Manual identify that OCR/ECRCO may make "determinations" or "findings" of compliance or noncompliance, respectively.<sup>7</sup>

These Issues are the basis of ECRCO's investigation, and the second, broadly drafted Issue is the subject of the Partial Preliminary Findings. ECRCO's Partial Preliminary Findings present a variety of flawed—or in some instances, capriciously conclusory—factual and legal assertions. The following subsection identifies ECRCO's problematic practices applicable to the conclusions within the Partial Preliminary Findings. The result of these fundamental problems is that ECRCO must dismiss Complaint No. 01RNO-20-R7.

**A. ECRCO's asserted Issues and cited legal authorities fail to provide sufficient specificity to fairly evaluate Department compliance.**

ECRCO fails to describe with particularity the legal obligations ECRCO alleges the Department has failed to uphold.<sup>8</sup> Merely citing to Title VI of the Civil Rights Act and related EPA

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<sup>5</sup> See, Exhibit 1, p. 2; Partial Preliminary Findings, p. 2. The Issues contain minor grammatical differences between these documents. While allegations are similar, the language in the Issues is not the wording from the Great Rivers Environmental Law Center (GRELC) Complaint, Exhibit 2, p. 17.

<sup>6</sup> CRM, p. 12.

<sup>7</sup> 40 C.F.R. § 7.130; Case Resolution Manual, p. 28.

<sup>8</sup> The following are reproductions of the citations used for Issues One and Two in both Exhibit 1 and the Partial Preliminary Findings:

[Issue One] Title VI of the Civil Rights Act, 42 U.S.C. 2000(d) *et seq.* (prohibiting discrimination on the basis of race, color or national origin); 40 C.F.R. Parts 5 and 7. *See also* U.S. EPA, Chapter 1 of the U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit: Chapter 1, transmittal letter, and FAQs, at [https://www.epa.gov/sites/production/files/2020-02/documents/toolkit\\_ecrco\\_chapter\\_1-letter-faqs\\_2017.01.18.pdf](https://www.epa.gov/sites/production/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf). (2017).

[Issue Two] *See* Title VI, 42 U.S.C. 2000(d) *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a). *See also* U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (available at [https://www.epa.gov/sites/production/files/2020-02/documents/title\\_vi\\_lep\\_guidance\\_for\\_epa\\_recipients\\_2004.06.25.pdf](https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf)); U.S. EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 FR 14207 (March 21, 2006) (available at

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regulations in their entirety put the Department in an impossible position of trying to determine what provisions ECRCO alleges are being violated, and what set of facts would constitute compliance or noncompliance. In the Issues, the only specific citation is to 40 C.F.R. § 7.35(a), which incidentally, is not explicitly alleged as violated, and is only referenced in context with other broad citations to law (e.g.; “*See Title VI, 42 U.S.C. 2000(d) et seq...*”).<sup>9</sup>

Reviewing ECRCO citations compared to their preliminary findings makes plain how ECRCO has not clearly articulated what facts constitute a violation of which legal requirements when making a finding of noncompliance.<sup>10</sup>

### Law referenced in the Issues:

- Title VI of the Civil Rights Act, 42 U.S.C. 2000(d) *et seq.* (prohibiting discrimination on the basis of race, color or national origin);
- Title VI, 42 U.S.C. 2000(d) *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended;
- 29 U.S.C. § 794;
- 40 C.F.R. Parts 5 and 7;
- 40 C.F.R. § 7.35(a); and
- *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974).

### Guidance referenced in the Issues:

- U.S. EPA, Chapter 1 of the U.S. EPA’s External Civil Rights Compliance Office Compliance Toolkit: Chapter 1, transmittal letter, and FAQs;
- U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 FR 35602 (June 25, 2004);
- U.S. EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 FR 14207 (March 21, 2006);
- U.S. EPA, Procedural Safeguards Checklist for Recipients; and
- U.S. EPA, Disability Nondiscrimination Plan Sample.

Examples of ECRCO’s citations of law or guidance in preliminary findings of noncompliance:

- Regarding Retaliation and the Nondiscrimination Notice:

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[https://www.epa.gov/sites/production/files/2020-02/documents/title\\_vi\\_public\\_involvement\\_guidance\\_for\\_epa\\_recipients\\_2006.03.21.pdf](https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_public_involvement_guidance_for_epa_recipients_2006.03.21.pdf)); U.S. EPA, Procedural Safeguards Checklist for Recipients, at [https://www.epa.gov/sites/production/files/2020-02/documents/procedural\\_safeguards\\_checklist\\_for\\_recipients\\_2020.01.pdf](https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf) (rev. Jan. 2020) (which provides a more detailed explanation of nondiscrimination obligations and best practices); U.S. EPA, Disability Nondiscrimination Plan Sample, at [https://www.epa.gov/sites/production/files/2020-02/documents/disability\\_nondiscrimination\\_plan\\_sample\\_for\\_recipients\\_2020.01.pdf](https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf). (2017).

<sup>9</sup> Partial Preliminary Findings, p. 8-9.

<sup>10</sup> Partial Preliminary Findings, p. 6, fn. 17; 7-8; 9-10; and 10-11.

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- Partial Preliminary Findings page 6, footnote 17 cites to 40 C.F.R. §§ 7.85 and 7.95 as demonstrating noncompliance regarding retaliation (a word that does not appear in either regulation), but does *not* reference the applicable retaliation regulation 40 C.F.R. § 7.100.
- Regarding Grievance Procedures:
  - ECRCO's preliminary finding on pages 7 and 8 asserts noncompliance with grievance procedures, pointing to necessary bulleted elements as missing from the Department's plan. These elements have no citations to any legal authority, at all.
- Regarding Meaningful Access to Limited English Proficiency (LEP) Individuals:
  - On page 10 of the Partial Preliminary Findings, ECRCO asserts the Department is noncompliant with "Title VI and the general terms and conditions of EPA financial assistance," and 40 C.F.R. § 7.35(a), but no specific provisions of law are identified, either within 40 C.F.R. § 7.35(a),<sup>11</sup> the statutes, nor the U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 FR 35602 (June 25, 2004).
- Regarding Individuals with Disabilities:
  - The Partial Preliminary Findings on pages 10-11, include a statement that the Department's ADA-related documents "generally address the necessary components of a 'disability plan,'[and] meaningful access to individuals with disabilities to MoDNR's programs, services and activities...." But then ECRCO concludes its preliminary finding that DNR is "not in compliance with this requirement of EPA's nondiscrimination regulation" with no citation to any specifically violated provision, on the basis the non-ADA nondiscrimination notice and complaint procedure exists separate from the ADA procedures, and these parallel procedures are possibly confusing<sup>12</sup> making MDNR's compliant disability process noncompliant.

The CRM identifies that "ECRCO is **required** to notify recipients of preliminary findings **of fact and/or law**."<sup>13</sup> Additionally, the CRM states that:

A preliminary finding of noncompliance letter must include:

\* \* \*

- A statement of the **findings of fact for each issue(s) supported by any necessary explanation or analysis of the evidence on which the findings are based;**
- Conclusions **for each issue that reference the relevant facts, the applicable regulation(s), and the appropriate legal standards;**

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<sup>11</sup> 40 C.F.R. § 7.35 has four subsections, and 7.35(a) has seven subdivisions, none are specifically cited.

<sup>12</sup> Partial Preliminary Findings, p. 11: "Neither set of documents provides clear and consistent instructions or direction for persons with disabilities about which process to follow...."

<sup>13</sup> Case Resolution Manual, p. 28.

ECRCO's Partial Preliminary Findings *fail to do exactly that*. The Partial Preliminary Findings allege general regulatory noncompliance, and point to broadly cited laws, but ECRCO repeatedly does not cite to the *particular* statutes, regulations, or segments of guidance provisions it alleges are not being followed. Nor does ECRCO make specific applications of fact to law that clearly articulate how that circumstance demonstrates the alleged noncompliance, or supports the conclusion of noncompliance. Or, in some cases, the cited fact that ECRCO relies upon for its finding of noncompliance is so trivial that ECRCO wholly discounts an otherwise functioning and compliant policy. For example, the Nondiscrimination Notice is alleged as insufficient because the prohibition against retaliation is not explicitly presented in that document, even though that prohibition is explicitly stated in the staff policy prohibiting retaliation.<sup>14</sup> Another example is that the Nondiscrimination Notice is insufficient for the public to access staff because it does not include an employee's name, despite including an internal office name, phone number, and email address.<sup>15</sup>

The Department identified in its November 12, 2020, Response and in the Request for Information #1 DNR Answers (RFI #1 DNR Answers), as well as dozens of pages of material, the actions, policies, and procedures the Department follows to comply with federal nondiscrimination requirements. ECRCO's preliminary findings do not reflect that ECRCO objectively considered the Department's practices.

**B. ECRCO improperly applies the preponderance of the evidence standard and inconsistently applies fact to law.**

ECRCO asserts that it applies the preponderance of the evidence standard when evaluating *either* a finding of compliance *or* noncompliance.<sup>16</sup> ECRCO's application of the standard is lacking.

The Department will not recap here the over 700 pages<sup>17</sup> of material provided to ECRCO. But regarding Issue Two, the Department provided facts to ECRCO in our November 12, 2020, Response letter and the RFI #1 DNR Answers, as well as the Department Nondiscrimination Notice, the External Complaint of Discrimination Form, the two employee policies 1.02-03 Non-Discrimination/Anti-Harassment Policy and Complaint Procedures, 1.11 External Complaint Response Policy, Notice Under the Americans with Disabilities Act, and our Grievance Procedures under the Americans with Disabilities Act.

These documents collectively address:

- Public notice of nondiscrimination;
- Prohibitions on retaliation and discrimination for all protected classes;
- Providing public contact points for lodging discrimination complaints;

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<sup>14</sup> Partial Preliminary Findings, p. 6.

<sup>15</sup> *Id.*, p. 6, 7.

<sup>16</sup> Case Resolution Manual, p. 28-29.

<sup>17</sup> See, November 12, 2020 Response, RFI #1 DNR Answers, and the Department's Exhibits 1-41. The bulk of the material responds to Issue One, which remains under investigation. Partial Preliminary Findings, p. 11.

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- Grievance process for complainants, including how and to whom to make complaints;
- Providing contact points for meaningful access to Department services for all members of the public; and
- Obligating all Department staff to act towards others without discrimination, harassment, or retaliation:  
“This policy is designed to ensure that Department employees neither engage in nor are subjected to unlawful discrimination, harassment, or retaliation involving other employees, applicants for employment, *or non-employees who interact with the Department (e.g., vendors, members of the public, customers).*”<sup>18</sup>

Emphasis added. Throughout the Partial Preliminary Findings, ECRCO references selections of individual Department documents or responses, or asserts due to a single missing word or phrase the entire Department and policy is noncompliant, rather than considering the totality of the Department responses as a whole.<sup>19</sup>

This same selective review of the facts is not present with ECRCO’s evaluation of the Complaint. Section 1.8 of the CRM states that “ECRCO may reject a complaint allegation” if information from a credible source leads “ECRCO to conclude that an investigation is unjustified for prudential reasons.”<sup>20</sup>

Such prudential factors include, but are not limited to:

- The allegation lacks sufficient detail (i.e., who, what, where, when, how) for ECRCO to infer that discrimination or retaliation may have occurred or is occurring.
- The allegation, on its face or as clarified in the evaluation process, is not sufficiently grounded in fact for ECRCO to infer that discrimination or retaliation may have occurred or is occurring.<sup>21</sup>

Particularly telling is footnote seventeen to the second bullet above. It states:

This provision applies where the complaint allegation (including any additional information provided by the complainant) **does not provide sufficient information to raise the allegation above the level of speculation or where the available information appears to contradict the allegation.** The complaint

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<sup>18</sup> Employee Policy 1.02-03 Non-Discrimination Anti-Harassment Policy and Complaint Procedures, p. 1.

<sup>19</sup> Two notable examples where ECRCO *does* read two different documents together is perplexing; making mutually dependent DNR website content and DNR internal policy review practices; two procedures that are mutually exclusive. Partial Preliminary Findings, p. 9; see below Section III.D of this § 7.115(d) Response regarding LEP individual protections preliminary findings, p. 16-18. In the other example, ECRCO observes that the Department has compliant ADA protections and grievance procedures, and then finds the Department is noncompliant with ADA requirements. Partial Preliminary Findings, p. 10-11; see Section II.A above, and Section III.E below regarding disability preliminary findings, p. 19.

<sup>20</sup> CRM, p. 10.

<sup>21</sup> *Id.*, p. 11.

**must provide more than conclusions of alleged violations** of the laws enforced by ECRCO.<sup>22</sup>

Emphasis added. The only fact in Great Rivers Environmental Law Center's (GRELC) Complaint in the section on procedural safeguards is that GRECL's counsel could not find a nondiscrimination statement on the Department website.<sup>23</sup> Every other allegation by GRELC about procedural safeguards in pages 17 through 20 *are conclusory allegations of violations*.<sup>24</sup> Specifically they allege<sup>25</sup> (1) "MDNR lacks any Title VI compliance program, including those elements requirement by . . . 40 C.F.R. Part 7," (2) no complete notice of nondiscrimination, (3) no nondiscrimination coordinator, and (4) no nondiscrimination grievance procedures. The Department has fully rebutted each of these allegations in the responses to ECRCO.

Remarkably, ECRCO states in its Partial Preliminary Findings that its "investigation included interviews with the complainants' representative to learn more about their interactions with MoDNR and their documented allegations and to provide information on the investigative process...."<sup>26</sup> No documented allegations or factual assertions from these interviews with GRELC counsel are cited anywhere. These undisclosed documented allegations and interviews are nevertheless referenced by ECRCO's investigation with the implication that they were relied upon for confirming the sufficiency of the Complaint. In contrast, while ECRCO contacted the Department in advance of presenting the requests for information, at no point did ECRCO ask for any interview. Department Counsel prompted ECRCO to keep the lines of communication open three weeks after submitting the RFI #1 DNR Answers.<sup>27</sup> ECRCO replied that it would follow-up with [the Department] with additional questions or clarifications as needed.<sup>28</sup> The next contact was March 29, 2021 seeking a same-day meeting to provide notice of the forthcoming issuance of the Partial Preliminary Findings.<sup>29</sup>

ECRCO's reliance on conclusory allegations and undisclosed representations by GRELC for accepting the Complaint contrast greatly with ECRCO's factual analysis in the Partial Preliminary Findings. The Department cannot tell from the Partial Preliminary Findings how ECRCO analyzed the Department's facts in either the November 12, 2020 Response, or the RFI #1 DNR Answers, which responded to and rebutted each and every written allegation, and included documented proof. Because the Complaint and Issue Two only consist of conclusory allegations, the only facts are those presented by the Department. Thus, the Department's

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<sup>22</sup> CRM, p. 11, fn. 17.

<sup>23</sup> Exhibit 2, p. 18, fn. 100. GRELC counsel reference a "workplace nondiscrimination policy" but the website citation is not a direct URL. Exactly what document GRECL counsel references is not clear. However, the Department's Employee Policy 1.02-03 Non-Discrimination Anti-Harassment Policy and Complaint Procedures is available, and which clearly prohibits discrimination by the Department against the public.

<sup>24</sup> Exhibit 2, p. 18-20. Other assertions relate to the reissuance of the Part 70 Permit, which has no relevance to the Department's procedural safeguards or the ECRCO's particular preliminary findings.

<sup>25</sup> Exhibit 2, p. 18.

<sup>26</sup> Partial Preliminary Findings, p. 3.

<sup>27</sup> Email from Department to ECRCO dated March 2, 2021.

<sup>28</sup> Email from ECRCO to Department dated March 3, 2021.

<sup>29</sup> Email from ECRCO to Department dated March 29, 2021.

rebuttal of the GRELC and ECRCO assertions demonstrates compliance by a preponderance of the evidence.

Despite MDNR's rebuttal, ECRCO nevertheless makes preliminary findings of noncompliance in favor of GRELC and its own conclusory assertions, against the weight of the documentation and representations by the Department. ECRCO improperly applies its stated standard of evidence, and inconsistently applies facts to law.

**C. ECRCO capriciously placed a burden of proof on the Department to demonstrate compliance.**

Federal regulations 40 C.F.R. Part 7, Subpart E discusses post-award compliance of recipients such as the Department. The Department is obligated to provide data and information to the Office of Civil Rights upon request. Regulations §§ 7.105, 7.110, and 7.115 say nothing about the award recipient having the burden to disprove a complaint lodged against it. The CRM is likewise silent as to a burden of proof. However, ECRCO states that "ECRCO is a neutral fact-finder"<sup>30</sup> that will gather relevant information for analysis.

The first step of that process is to evaluate the complaint.<sup>31</sup> Here, the Complaint lodges only conclusory allegations. Because the ECRCO accepted those allegations as sufficient for its Complaint, rather than evaluating whether even prima facie facts existed to support a complaint, ECRCO created and shifted a burden of proof to the Department. This extra-regulatory burden forces DNR to disprove allegations by ECRCO's preponderance of the evidence standard, rather than ECRCO conducting an actual, neutral process of fact gathering.

ECRCO's actions reinforce this silent burden on the Department. By using imprecise citations of law and selective application of fact and law, ECRCO claims to be making preliminary findings to a preponderance of the evidence standard. Instead, ECRCO's treats the allegations as fact, and rejects Department facts and evidence as nonpersuasive.

Yet, despite there being no formal burden of proof, the Department has nevertheless demonstrated by statement and documentation that it is complying with federal requirements.

ECRCO's preliminary findings are, at best, unsupported allegations.

**D. ECRCO makes no findings of discrimination using the applicable legal standards.**

The CRM identifies planning an effective case requires including "identification of all legal theories that would be applicable to the issues identified for investigation."<sup>32</sup> ECRCO's responsibility, then, is to "establish a factual record sufficient to determine whether discrimination has occurred under *any applicable legal theory*."<sup>33</sup> Emphasis added. ECRCO then

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<sup>30</sup> Exhibit 1, p. 3.

<sup>31</sup> Case Resolution Manual, p. 5. "Chapter 1 Evaluation of Complaints."

<sup>32</sup> Case Resolution Manual, p. 26. Emphasis added.

<sup>33</sup> *Id.*

identifies three types of legal claims: (a) Disparate/Different Treatment, (b) Disparate Impact/Effects, and (c) Retaliation.<sup>34</sup>

Nowhere in the Partial Preliminary Findings does ECRCO make any factual or legal determination that the Department is acting in a discriminatory manner, through either Disparate/Different Treatment, or Disparate Impact/Effects. Nor does ECRCO make any finding as to any retaliation claim. Nor does ECRCO demonstrate that the alleged procedural noncompliance leads to any of the above legal theories. This is because the Department is not discriminating or retaliating, the procedures and policies follow the law, and the Department proactively takes steps to prevent discriminatory and retaliatory behavior.

**E. ECRCO's preliminary findings are inconsistent with the EPA's silence as to the Department's annual compliance representations and program audit findings.**

As a recipient of federal funding through the EPA, the Department is obligated to make affirmative representations of the Department's compliance with federal nondiscrimination requirements. The Department has made those representations annually, for years, and has not received any prior notice of noncompliance. The annual representations are a natural, neutral procedural checkpoint to evaluate the Department's policies and practices. If any actual, meaningful compliance concern existed, it could and would have been previously raised.

Additionally, the Department undergoes cyclical State Review Framework audits, among other EPA audits. None of these audits has included a finding related to Title VI and/or EPA nondiscrimination.<sup>35</sup> If Title VI or discriminatory behavior were occurring, it would be counter-intuitive for a program audit to ignore that behavior.

**F. ECRCO's Complaint is insufficient and must be dismissed.**

ECRCO is obligated to dismiss the Complaint No. 01RNO-20-R7 pursuant to 40 C.F.R. § 7.120(g). There is no violation of Part 7, and the allegations levied against the Department are unsubstantiated and conclusory. ECRCO's own CRM Section 1.8 recommends that where other information exists (EPA's own audits, Exhibits 42-51) demonstrate the complaint is "not sufficiently grounded in fact" to infer discrimination or retaliation, the complaint may be rejected.

**III. The Department's responses to the specific preliminary findings**

This § 7.115(d) Response shall reply to each preliminary finding, to the extent that (1) the findings are clearly identified and (2) require a reply. To the extent that a given preliminary finding is redundant or repetitive, the Department will only respond once, and will direct ECRCO to the relevant subsection.

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<sup>34</sup> *Id.*

<sup>35</sup> See, <https://www.epa.gov/compliance/state-review-framework-srf-missouri-final-reports> Round 4 includes a 2018 final program review of the Air Pollution Control Program, the program that issued the renewed Part 70 Operating Permit that is the underlying issue of GRELC's Complaint.

**A. Notice of Nondiscrimination**

ECRCO's Partial Preliminary Findings make three observations regarding the Department Notice of Nondiscrimination that conclude DNR is not in compliance with the EPA's nondiscrimination regulation. ECRCO's findings are incorrect. The Department will respond to each in turn.

**1. Regarding Retaliation**

ECRCO asserts that the Department's Nondiscrimination Notice does not include notice of prohibition against "retaliation discrimination," or retaliation against a complainant for exercising his or her rights.<sup>36</sup>

Discussion of retaliation appears twelve times in the Department's "Non-discrimination/Anti-Harassment Policy and Complaint Procedures" Number 1.02-03,<sup>37</sup> including the one-sentence-paragraph consisting of only four words: "Retaliation is strictly prohibited."<sup>38</sup> Yet, the ECRCO preliminary finding that the Department is noncompliant relies on the *external* Nondiscrimination Notice not including a statement prohibiting "retaliation discrimination." ECRCO's Preliminary Finding appears to rely solely on this external document, rather than the internal staff policy. This is problematic.

First, ECRCO's preliminary determination appears to ignore the plainly stated, mandatory, internal policy *directed to Department staff* previously provided to ECRCO. This internal policy dictates employees' behavior, and absolutely prohibits both internal and external discrimination and retaliation. This internal prohibition is as important, if not more so, than external facing promises not to discriminate or retaliate. ECRCO should not ignore the internal policy for the external notice—they are both applicable. Additionally, staff training on the internal policy is mandatory, and requires staff attendance and acknowledgment of the policy.<sup>39</sup>

Second, ECRCO's preliminary finding concludes noncompliance with federal regulations, but appears to ignore the applicable federal regulation. Federal regulation 40 C.F.R. § 7.100 explicitly prohibiting retaliation *does not require* retaliation appear in the Notice of Nondiscrimination; nor does § 7.95(a)'s "requirements" mention retaliation. This is common sense: a prohibition is most meaningful when targeted at the persons who would engage in the prohibited conduct.

The Department's disagrees with ECRCO's claim. Nevertheless, the Department concludes there is value in consistency and has added language that retaliation is prohibited to our Notice of Nondiscrimination, External Complaint Response Policy, and External Complaint of Discrimination Form.

**2. Regarding the Nondiscrimination Coordinator**

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<sup>36</sup> Partial Preliminary Findings, p. 6.

<sup>37</sup> See, Exhibit 39.

<sup>38</sup> Exhibit 39, p. 3.

<sup>39</sup> Exhibit 39, p. 5. All Department Staff re-completed this training during calendar year 2020.

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ECRCO asserts that the Department's Nondiscrimination Notice does not identify a designated Nondiscrimination Coordinator with enough specificity to enable a member of the public to contact that Coordinator.<sup>40</sup>

In the Nondiscrimination Notice and our External Complaint of Discrimination Form, the Department identifies the Office of Employee Relations and a contact number and email address so that any member of the public may contact the Department's Nondiscrimination Coordinator via that Office. Nondiscrimination is a team effort, which the federal regulations acknowledge:

§ 7.85(g): Coordination of compliance effort. If the recipient employs fifteen (15) or more employees, **it shall designate at least one person** to coordinate its efforts to comply with its obligations under this part.

\* \* \*

§ 7.95(a): Requirements. A recipient shall provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, age, or handicap in a program or activity receiving EPA assistance or, in programs or activities covered by section 13, on the basis of sex. . . . **The notice must identify the responsible employee designated in accordance with §7.85.**

Nowhere in §§ 7.85 or 7.95 does either regulation state that such an individual's name must be provided. Instead the regulations recognize *more than one person* may assist. Aside from assisting with the public, the purpose of the Nondiscrimination Coordinator is to assist *the recipient* with meeting obligations of OCR.<sup>41</sup>

The Department's Nondiscrimination Coordinator has always been accessible to the public. The employee was identified internally, and by name in the Notice Under the Americans with Disabilities Act.<sup>42</sup> Any member of the public seeking the Nondiscrimination Coordinator is able to reach that person via a phone call or email. Any team member in the Employee Relations Office can assist a member of the public with the issue, or with contacting the coordinator. Identifying a sole person by name, as ECRCO asserts is necessary for compliance with the regulation, rather than by title or position, does not automatically equate to easier access to or delivery of services. In fact, requiring a specific employee name introduces potential inaccuracy for the public upon any personnel change.

The Department's disagrees with ECRCO's claim. Nevertheless, DNR has included the name of our current Human Resources Manager / Nondiscrimination Coordinator to our Notice of Nondiscrimination and External Complaint of Discrimination Form.

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<sup>40</sup> Partial Preliminary Findings, p.6

<sup>41</sup> Pursuant to 40 C.F.R. § 5.135(a) the obligation is to identify an employee that coordinates complying and carrying out Title XI responsibilities for the recipient entity, *for contact for persons associated with that recipient* (i.e. faculty, employees, and students). Department staff were always able to direct a complaint, internal or external, to the Nondiscrimination Coordinator.

<sup>42</sup> Exhibit 17.

### 3. Regarding LEP access to the Nondiscrimination Notice

The Department's responses here are duplicative to responses to the preliminary findings discussed in Section III.D Meaningful Access for Persons with Limited English Proficiency (LEP) below.

#### B. Nondiscrimination Coordinator

ECRCO's allegations are the same as III.A.2 above. The Department directs ECRCO to the response at III.A.2.

#### C. Grievance Procedures

ECRCO's Preliminary Findings claims the Department's External Complaint Response Policy and External Complaint of Discrimination Form does not comply with the EPA's nondiscrimination regulations. The Department will respond to each claim in turn. Nevertheless, ECRCO's findings are incorrect. The Department is meeting the requirements of the federal regulations. Our continued compliance will be met with practices other than those recommended by ECRCO.

#### 1. Regarding the promptness and fairness of MDNR's grievance procedures

ECRCO alleges that "the Department's External Complaint Response Policy does not describe elements of an investigation process," and therefore MDNR "is not in compliance with EPA's nondiscrimination regulation with respect to the *adoption* and *publication* of grievance procedures."<sup>43</sup> Emphasis added.

EPA regulation requires that recipients of federal funding must:

- 40 C.F.R. § 5.135(b) Complaint procedure of recipient. **A recipient shall adopt and publish grievance procedures** providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.
- 40 C.F.R. § 7.90(a): Requirements. Each recipient **shall adopt grievance procedures that assure the prompt and fair resolution** of complaints which allege violation of this part.

ECRCO also points to a Department of Justice regulation that requires recipients of federal funding must:

state that the recipients operate programs subject to the nondiscrimination requirements of title VI, summarize those requirements, note the availability of title VI information from recipients and the federal agencies, and **explain briefly the procedures for filing complaints**. Federal agencies and recipients shall also

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<sup>43</sup> Partial Preliminary Findings, p. 7, 8.

include information on title VI requirements, **complaint procedures** and the **rights of beneficiaries**. . . .

28 C.F.R. § 42.405(c). Emphasis added.<sup>44</sup>

The Department's Non-Discrimination/Anti-Harassment Policy and Complaint Procedures, Nondiscrimination Notice, External Complaint Response Policy, and External Complaint of Discrimination Form all "summarize [the nondiscrimination requirements of title VI], note the availability of title VI information, and explain briefly the procedures for filing complaints" (i.e., lodging a complaint with MDNR) as well as "complaint procedures" (i.e., the investigation of the complaint) and "rights of beneficiaries" (i.e., what complainants may do).

Department policies direct that "[a]ll external complaints of discrimination must be forwarded immediately to the Department's Employee Relation Office (ERO) for investigation."<sup>45</sup> Employees are responsible "to immediately report the incident(s)" of discriminatory behavior.<sup>46</sup> The Department commits to pursuing "a thorough and timely investigation to occur" upon "prompt reporting of such complaints or concerns" to the ERO.<sup>47</sup>

For "filing complaints," a potentially aggrieved individual may provide to any Department employee, via in-person, phone, or email, a verbal or written complaint, which the receiving employee must provide to the ERO.<sup>48</sup>

For the "complaint procedures" and fairness, the Department states that "the ERO is responsible for investigating complaints," that "Department employees are required to provide requested information and assistance to the ERO during its investigation" and that "upon completion of an investigation, the ERO will provide the complainant with a written notice that the investigation has been completed." Additionally, "the complainant will also be notified of their right to file a complaint, if applicable, with the appropriate state or federal agency, regardless of the ERO's determination."<sup>49</sup>

Moreover, the Department's Non-Discrimination / Anti-Harassment Policy and Complaint Procedures provides further detail of how ERO internally conducts an investigation. Examples of internal investigation steps include: interview with the complainant, interviews with all appropriate witnesses, interview with the individual accused of the alleged act(s), review of any relevant documentation, and preparation of a written investigative report.<sup>50</sup>

The Department's grievance procedures are consistent with federal regulation 28 C.F.R. § 42.405(a). The nondiscrimination requirements of title VI, a summary of those

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<sup>44</sup> The first of ECRCO's assertions of noncompliance regarding grievance procedures is regarding assuring promptness and fairness. Partial Preliminary Findings, p. 7-8. Emphasized language focuses on those points.

<sup>45</sup> Exhibit 41, p. 1.

<sup>46</sup> Exhibit 39, p. 3-4.

<sup>47</sup> Exhibit 39, p. 4.

<sup>48</sup> If the direct recipient is not the Employee Relations Office. See, Exhibits 38, 40, 41.

<sup>49</sup> Exhibit 41.

<sup>50</sup> Exhibit 39, p. 4

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requirements, the availability of those requirements, a brief explanation of the complaint filing procedure, the complaint procedures, and the rights of beneficiaries, are all present.

Further, the Department responded in the Departments Answers to Request for Information #1 (RFI #1 DNR Answers) that, “yes,” an “appropriate, prompt and impartial investigation of any allegations filed under federal non-discrimination statutes will be conducted.”<sup>51</sup>

Nevertheless, ECRCO asserts noncompliance with the EPA regulations, based on “MoDNR’s External Complaint Response Policy does not describe [1] elements of the recipient’s investigation process or [2] provide timelines for: [A] the submission of a discrimination complaint; [B] the investigation’s review, [C] conclusion, or [D] resolution process; or [E] making an appeal of any final decision(s).”<sup>52</sup> Alphanumeric identifiers added for clarity. These asserted requirements are not cited; either in statute, federal regulation, nor case law. Nor are they found in ECRCO-referenced EPA guidance. These asserted process requirements appear to be *ad hoc*. Nor does ECRCO appear to apply any of the Department’s policies to the above *ad hoc* elements, of which at minimum, 1A, 1B, 1C, 1D are met.<sup>53</sup> Additionally, 1E is met in spirit and function by making clear that “Nothing in this policy prevents any party from pursuing remedies or resolution through local, state or federal agencies or the courts” and “the complainant also will be notified of their right to file a complaint, if applicable, with the appropriate state or federal agency, regardless of the ERO’s determination.”<sup>54</sup>

With no evidence contrary to the Department’s, ECRCO makes a preliminary finding that the Department’s grievance procedure is noncompliant. Because there is not contrary evidence, ECRCO must somehow discount the veracity of DNR’s statements and documentation, but provides no basis for why or how this is appropriate.

The Department does not accept conclusory findings that do not adhere to ECRCO’s own stated evidentiary standard of a preponderance of the evidence.<sup>55</sup> Nor does the Department accept uncited, *ad hoc* requirements asserted as “necessary” to demonstrate compliance with 40 C.F.R. §§ 5.135(b), 7.90(a), and 28 C.F.R. § 40.405.

The Department is always open to ways of improving its processes. The Department herein reaffirms its commitment to ensuring prompt and fair complaint procedures and conducting prompt and fair investigations of complaints of discrimination or retaliation.

ECRCO’s preliminary finding is incorrect, and its recommendations for voluntary compliance in Section V of the Partial Preliminary Findings go beyond even the above *ad hoc* complaint process requirements. The Department meets all requirements of the applicable regulations, and is not required to adopt practices that are simply recommendations by ECRCO and not in 40 C.F.R §§ 5.135(b), 7.90, and 28 C.F.R. § 40.405.

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<sup>51</sup> RFI #1 DNR Answers, p. 16.

<sup>52</sup> Partial Preliminary Findings, p. 7.

<sup>53</sup> Exhibit 39, p. 5; Exhibit 41, p. 2, respectively.

<sup>54</sup> *Id.*, p. 5.

<sup>55</sup> ECRCO Case Resolution Manual, p. 29.

**2. Regarding Retaliation**

The Department directs ECRCO to the response found at III.A.1 above and here restates the same.

**3. Regarding LEP access to the Grievance Procedure**

The Department's responses here are duplicative to responses to the preliminary findings discussed in Section III.D Meaningful Access for LEP Persons below.

**D. Meaningful Access for Persons with Limited English Proficiency**

ECRCO's Preliminary Findings make various conclusory observations to assert that the Department is not in compliance with Title VI and the general terms and conditions of EPA financial assistance recipient Terms & Conditions (EPA Terms & Conditions) to assure meaningful access to individuals with limited English proficiency. ECRCO's findings are incorrect, and Department will continue to evaluate and improve its practices rather than those recommended by ECRCO.

42 U.S.C. § 2000(d) *et seq.* and EPA regulation 40 C.F.R. § 7.35 prohibit discrimination against national origin. National origin has been interpreted to encompass individuals with limited English proficiency.<sup>56</sup> Additionally, the EPA Terms & Conditions direct recipients to "use as a guide" material published at 69 Fed. Reg. 35602. The Department is using that guidance, and is continuing to make strides in its public communication with LEP individuals. The Department stated to ECRCO in our November 12, 2020, Response and repeated in our Answers to ECRCO's Requests for Information #1 (RFI #1 DNR Answers) that MDNR provides translation/interpretation services free of charge for LEP individuals as needed.<sup>57</sup>

To assert a violation of any of the above federal laws, or of the EPA Terms and Conditions, ECRCO must demonstrate by a preponderance of the evidence that the Department is not following the EPA's guidance found at 69 Fed. Reg. 35602 (LEP Guidance). ECRCO cannot prove this allegation.

The LEP Guidance discusses a four-factor analysis to determine the extent of the Department's obligation to provide LEP services.<sup>58</sup> Those four factors are, in summary (1) analysis of population served, (2) frequency of LEP contacts, (3) the nature and or importance of recipient programs, and (4) the resources available to recipient and costs. The LEP Guidance states that "[t]his four-factor analysis necessarily implicates the 'mix' of LEP services required" and that federal recipients "have two main ways to provide language services: Oral interpretation in person or via telephone interpretation service (hereinafter 'interpretation') and written translation (hereinafter 'translation')." <sup>59</sup> Right now, the Department provides both translation and

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<sup>56</sup> *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974). Nothing in *Lau* provides procedural guidance on providing translation or interpretation services.

<sup>57</sup> Nov. 12, 2020 Response, p. 11-12; RFI #1 DNR Answers, p. 13-20.

<sup>58</sup> LEP Guidance, 69 Fed. Reg. 35602, at 35606.

<sup>59</sup> LEP Guidance, 69 Fed. Reg. 35602, at 35607.

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interpretive services based on statewide contracts, and can translate or interpret upon demand. These services are provided free of charge to the individual needing the service.<sup>60</sup> Thus, the Department is following the LEP Guidance.

Looking at the four factors in particular, in ECRCO's Letter of Acceptance and Preliminary Findings, it asserts that the scope of its "issues for investigation" regarding procedural safeguards is for "MoDNR's services, programs and activities."<sup>61</sup> As ECRCO is evaluating the Department's procedures in whole, ECRCO's scope and the Department's own assessment for our (1) population served is the entire state.

United States Census Bureau data for Missouri from 2019 demonstrate that 93.4% of Missourians speak only English.<sup>62</sup> Of the remaining Missourians who primarily speak another language at home, Spanish accounts for 2.9%, other Indo-European languages account for 1.7%, and Asian and Pacific Island languages account for 1.4%.<sup>63</sup> Of those populations, respectively, 33.8%, 28.4%, and 35.1% speak English less than very well, or, a total of only 1.98% of the over 5 year-old speaking population in the state.<sup>64</sup>

The Department's regional offices, including in the St. Louis area serving Dutchtown, report no contacts from non-English speaking individuals during the last three years that necessitated translation services. The Department views all of its programs as vital to the proper service and support of human health and the environment throughout the state. The Department participates in statewide contract that provide multiple options for on demand translation and interpretation services.<sup>65</sup> The Department can provide these services to the public, upon request, free of charge.

The LEP Guidance asserts that it is "designed to be flexible and fact dependent."<sup>66</sup> Nevertheless, ECRCO identifies in its Preliminary Findings, despite its own guidance, the following specific items necessarily demonstrate that DNR is not in compliance with Title VI and the federal terms and conditions regarding persons with limited English proficiency.

ECRCO asserts the Department does not have a specific policy or procedure to ensure meaningful access for individuals with limited English proficiency.<sup>67</sup> This assertion is incorrect. The Department has a policy and procedure that is simple: upon request, it will provide translation and interpretation services free of charge.<sup>68</sup>

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<sup>60</sup> Nov. 12, 2020 Response, p. 11-12; RFI #1 DNR Answers, p. 13-20.

<sup>61</sup> Exhibit 1, Acceptance of Administrative Complaint, p. 2; Partial Preliminary Findings, p. 2.

<sup>62</sup> United States Census Bureau, <https://data.census.gov/cedsci/profile?g=0400000US29> (American Community Survey 2019).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* These numbers account for approximately 55,617 Spanish speakers; 28,483 speakers of Indo-European languages; 28,341 speakers of Asian-Pacific languages, or an approximate total of 112,441 people in the state of Missouri).

<sup>65</sup> RFI #1 DNR Answers, p. 20.

<sup>66</sup> LEP Guidance at 35606.

<sup>67</sup> Partial Preliminary Findings, p. 9.

<sup>68</sup> Nov. 12, 2020, Response, p. 11-12; RFI #1 DNR Answers, p. 13-20.

ECRCO asserts that because the Department wrote our “website is over 20 years old” and “our current redesign project will make our website more compatible for individuals with limited English proficiency...” and that the “Department reviews and updates its policies and practices, as needed, including those related to nondiscrimination,” this somehow “affirms”<sup>69</sup> ECRCO’s preliminary finding of no LEP policy or procedure.<sup>70</sup>

There are several erroneous assumptions with this assertion. For example: it incorrectly assumes that the website *material* or *content* is 20 years old rather than the format or platform upon which the website is structured. It assumes that the only location Department policies may be finalized is through publication on the website. It assumes whether or not a Department policy is up-to-date *is dependent* upon an updated website (rather, the two are mutually exclusive). None of these assumptions are true. The Department is otherwise unable to understand what ECRCO means by combining these mutually exclusive statements.

Subsequently articulated, ECRCO asserts that there is no policy in writing.<sup>71</sup> Specifically, the Department “failed to provide copies of any policies or procedures ensuring meaningful access to persons with LEP or even a description of a decision-making process used for providing such language services.”<sup>72</sup> According to the LEP Guidance, a written plan is not required.<sup>73</sup> Instead the LEP Guidance contemplates that some recipients may not have a written plan, and the recipient “should consider alternative ways to articulate in some other reasonable manner a plan for providing meaningful access.”<sup>74</sup> The Department has articulated in a reasonable manner the plan for providing meaningful access—free translation or interpretation upon request.

ECRCO further asserts that no translated documents were provided to ECRCO, including none for the public solicitation for comments related to the Kinder Morgan Transmix Company LLC Intermediate Operating Permit OP2020-008.<sup>75</sup> This is true. First, ECRCO asked if any DNR documents were translated, and the Department did not conduct an exhaustive search for every possible document that it may possess that has been translated. Second, the Department did not receive a request for any translation or interpretive services related to the Kinder Morgan Transmix Company LLC, and thus has no translated/interpreted documents.<sup>76</sup>

ECRCO’s Preliminary Findings are incorrect. The Department is in compliance and continues to comply with the requirements of the LEP Guidance. **ECRCO’s findings that MDNR could do more or provide such services differently does not make the Department noncompliant with LEP requirements.** The Department continues to make efforts to improve public access. The Department is updating its Notice of Nondiscrimination to clarify that LEP individuals can seek

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<sup>69</sup> Partial Preliminary Finding, p. 9.

<sup>70</sup> *Id.*

<sup>71</sup> Partial Preliminary Findings, p. 9.

<sup>72</sup> *Id.*, p. 9-10.

<sup>73</sup> LEP Guidance at 35611.

<sup>74</sup> LEP Guidance at 35611.

<sup>75</sup> Partial Preliminary Findings, p. 10.

<sup>76</sup> RFI #1 DNR Answers, p. 6, responses to questions #18 and #19.

interpretation and translation services upon request without charge. The Department is also making this sentiment available as a part of its Notice of Nondiscrimination multiple languages.

Finally, we note that the LEP Guidance was issued in June 2004. Technology has changed dramatically in the ensuing seventeen years.<sup>77</sup> Communication across language barriers is now easier and more accessible than ever. There are multiple websites and web-based tools that provide free translations. One example allows a user to put a website URL into the translation operation and produce a website page translated into a desired language.

#### **E. Individuals with Disabilities**

ECRCO's Preliminary Findings make two observations regarding the Department's efforts to not discriminate against individuals with disabilities: that the Department has an ADA grievance policy and a general nondiscrimination policy, and, that there is an inconsistent time period in these documents, and thus concludes that DNR is not in compliance with the EPA's nondiscrimination regulation. The Department disagrees with ECRCO's findings and will respond to each in turn.

ECRCO observes that the Department's Notice and Grievance procedures specifically addressing the Americans with Disabilities Act:

generally address the necessary components of a "disability plan," meaningful access to individuals with disabilities to MoDNR's programs, services and activities....<sup>78</sup>

ECRCO then criticizes the Department for having two sets of Notices and grievance procedures, one for general nondiscrimination, the other specifically for individuals with disabilities.<sup>79</sup> ECRCO asserts that persons with disabilities may not know which grievance policy to use for a claim or to seek accommodation. ECRCO points out there is a discrepancy between Notices regarding hours in advance the Department asks to be notified to provide reasonable accommodations, with one stating a 48 hour period and the other providing a 72 hour period. ECRCO then concludes that the Department is not in compliance with EPA's nondiscrimination regulation. These conclusions are speculative and not based on any facts. Nor does the speculative analysis consider that the DNR would promptly act on that request or complaint, no matter the means that it was received.

ECRCO's finding is incorrect because its assertion of non-compliance relies on total speculation that confusion will result in a choice between two options, and also, reliance on what amounts to an error.<sup>80</sup> The Department will ensure our continued compliance with practices other than those recommended by ECRCO.

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<sup>77</sup> Facebook launched in February 2004. Google announced Gmail on April 1, 2004. That year, the FCC analyzed whether broadcast television signals ought to be digital rather than analog.

<sup>78</sup> Partial Preliminary Findings, p. 10-11.

<sup>79</sup> *Id.*, 11.

<sup>80</sup> Which has been corrected.

## F. Public Participation

ECRCO's preliminary finding is incorrect and internally inconsistent. ECRCO says it is still investigating whether the Department "has public participation policies and processes that are consistent with Title VI and the other federal civil rights laws, EPA's implementing regulation at 40 C.F.R. Parts 5 and 7, and EPA's guidance on this issue" but then finds "based on the limited information" that the Department's public participation process "relative to . . . Kinder Morgan Transmix Company, LLC., was not implemented consistent with Title VI . . . as meaningful access to those proceedings was not provided to persons with limited-English proficiency."<sup>81</sup>

First, ECRCO does not cite any specific Title VI statute, case law, or Part 5 or Part 7 regulation, either as to the Department's obligations or to the preliminary finding of noncompliance regarding the public notice of the renewed operating permit. ECRCO does cite guidance—U.S. EPA, Title VI Public Involvement Guidance for EPA, Assistance Recipients Administering Environmental Permitting Program, 71 Fed. Reg. 14207. However, as noted *by that guidance*:

**This is a guidance document, not a regulation.** This document offers suggestions to recipients about enhancing public involvement processes in environmental permitting and addressing potential Title VI issues before complaints arise. **Recipients remain free to use approaches other than the ones suggested here.**<sup>82</sup>

Emphasis added. Additionally, the Department is providing public notice and seeking public participation in a manner *that the EPA itself* has identified as an effective way to reach the most people, include community associations or universities that represent minority communities.<sup>83</sup> The Department notes that the public notice provisions for the Clean Air Act guidance, which it is following, and is a full ten years more recent than ECRCO's referenced guidance.

The Department is following specific program guidance by the EPA on public notices. The Department provides LEP access upon request. ECRCO cannot have it both ways. If ECRCO is going to make a preliminary finding against the Department on guidance, ECRCO's analysis ought to include analysis of the more recent and more specific guidance to recipient programs. It does not. ECRCO's preliminary findings are inconsistent and incorrect. For any remaining analysis regarding LEP access, the Department directs ECRCO to the response found at Section III.D above and here restates the same.

## IV. Response to Recommendations

The five pages of "recommendations" to address the alleged compliance deficiencies raised in the above sections go beyond the few, specific, factual observations made by ECRCO, many of which the Department disputes. Additionally, the final set of recommendations are about training, which was neither alleged by the Complainant nor ECRCO to be deficient, nor

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<sup>81</sup> Partial Preliminary Findings, p. 11.

<sup>82</sup> Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Program, 71 Fed Reg. 14027, at 14208 (March 21, 2006); Exhibit 15, p. 2.

<sup>83</sup> Revisions to Public Notice Provisions in Clean Air Act Permitting Programs, 18 Fed Reg. 71613-71631 (October 18, 2016); Exhibit 7.

previously raised in any ECRCO correspondence as under investigation, nor were any preliminary findings made about training.

Moreover, evaluating the informal resolutions reached between ECRCO and other state recipient programs since 2020 to the present,<sup>84</sup> DNR notes that many of the recommendations here are the same or similar as those for other states. This one-size-fits-all approach supports that ECRCO is not a neutral fact finder. Rather, ECRCO appears to suggest the same recommendations upon every state, regardless of the vintage or effectiveness of its guidance.

The Department above indicated places in its policies and processes that it will change for clarity and consistency. The Department is not obligated to adopt recommendations that are (1) not supported by federal statute or regulation, (2) not consistent with ECRCO's referenced guidance documents, and (3) inconsistent or unsupported by ECRCO's own analyses for the preliminary findings. The Department is not obligated to adopt these recommendations. DNR will continue to comply with federal Title VI requirements by means other than those recommended by ECRCO.

## **V. Conclusion**

The ECRCO's Partial Preliminary Findings are capriciously concluded and incorrect. The Department is complying with federal nondiscrimination requirements. The Department's choice not to participate in alternative dispute resolution over unsubstantiated allegations is not a measure of its compliance with federal requirements; and moreover, should not be used by ECRCO as a measure of the Department's commitment to nondiscrimination. The Department did not, has not, and will not discriminate or retaliate against any individual or community of any protected class for any reason. The Department will continue to comply with federal requirements by means other than those recommended by ECRCO.

For all of the forgoing reasons, ECRCO is obligated to dismiss the Complaint No. 01RNO-20-R7 pursuant to 40 C.F.R. § 7.120(g). There are no violations of Part 7. The allegations levied against the Department are unsubstantiated and conclusory, and ought not have been accepted as a complaint from the start. ECRCO's own CRM Section 1.8 recommends that where the complaint is "not sufficiently grounded in fact" to infer discrimination or retaliation, the complaint may be rejected. There is no sufficient grounding in fact to demonstrate that any of the Department policies and procedures—which comply with federal nondiscrimination requirements and which ECRCO takes issue over—have ever caused discrimination. As a result, the federal regulation and ECRCO's own manual recommend dismissal of the complaint.

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<sup>84</sup> Found at <https://www.epa.gov/ogc/external-civil-rights-compliance-office-new-developments>.